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Supreme Court, U.
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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

LOUIS A. RUGGIRELLO,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Louis A. Ruggirello, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on January 14, 1972.

OPINION BELOW

The District Judge did not file an opinion. The opinion of the Court of Appeals is reported at 454 F2d 725. It is printed as Appendix A, *infra.*

JURISDICTION

The Judgment of the Court of Appeals was entered January 14, 1972 (Appendix B, *infra.)* A timely petition for rehearing was denied on March 27, 1972 (Appendix C, *infra).* Jurisdiction is conferred upon this court by 28 USC §1254.

QUESTIONS PRESENTED FOR REVIEW

I.

Does a court order requiring an indicted defendant not in custody to give the government handwriting exemplars to be used at the defendant's forthcoming trial violate his Fourth Amendment right against unreasonable search and seizure or his Fifth Amendment right not to incriminate himself?

II.

Does the failure of a defendant to object at trial to the admission of illegally obtained evidence waive the defendant's right to claim error where the illegality has been brought to the attention of the court prior to trial and the court has ruled adversely to the defendant?

III.

Does a United States Court have authority, either inherently or under Rules 16 and 17 of the Federal Rules of Criminal Procedure, to order a defendant awaiting trial to submit handwriting exemplars to the government?

CONSTITUTION PROVISIONS AND RULES OF CRIMINAL PROCEDURE INVOLVED

The United States Constitution, Amendment IV, provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The United States Constitution, Amendment V, provides in part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

The Federal Rules of Criminal Procedure provide in part as follows:

> Rule 16(c). Discovery by the Government.
>
> "If the court grants relief sought by the defendant under subdivision (a) (2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendnat permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by

government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys."

Rule 16 (g), Continuing Duty to Disclose; Failure to Comply.

"If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery of inspection under the rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances."

Rule 17 (c), For Production of Documentary Evidence and of Objects.

" . . . The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

STATEMENT OF THE CASE

Petitioner was indicted for income tax evasion. Prior to trial the government moved for an order requiring the defendant to submit handwriting exemplars. In support of the motion an assistant United States attorney stated in an affidavit:

> "2. In connection with the government's proof, there exists documents containing certain handwriting, the authorship of which is highly material.
>
> 3. The government accordingly desires to obtain samples of handwriting of the defendant, Louis A. Ruggirello, and submit same for examination to a laboratory of the United States Treasury Department.
>
> 4. Said examination will take several days and it is therefore necessary to have these samples in advance of commencement of trial."

Petitioner opposed the government motion and a hearing was held which consisted of the arguments of counsel. The court entered an order granting the government motion (See appendix D, *infra),* and petitioner complied with it.

At trial the exemplars were introduced in evidence and a handwriting expert for the government used them as a basis for his opinion that certain documents were in the handwriting of petitioner. He also stated his opinion that petitioner, in furnishing the exemplars, had attempted to disguise his handwriting. At his trial petitioner did not object to the introduction of the exemplars nor the opinion testimony of the government handwriting expert.

Petitioner was convicted and appealed to the Court of Appeals. The Court of Appeals affirmed the conviction on January 14, 1972, apparently holding that the failure to object at trial precluded appellate consideration of the order for production of handwriting exemplars.

REASONS FOR THE ALLOWANCE OF THE WRIT

I. a

REQUIRING DEFENDANT TO FURNISH THE EXEMPLARS VIOLATED HIS FOURTH AMENDMENT RIGHTS.

This issue has already been tendered to this court in the government's pending petitions for certiorari in *United States* v *Dionisio* (Docket No. 71-229), seeking review of *In re Dionisio*, 442 F 2d 276; and *United States* v *Mara*, (Docket No. 71-850); seeking review of *In re September 1971 Grand Jury*, 454 F 2d 580. There is this difference, however. Both respondents were witnesses before a grand jury rather than indicted defendants awaiting trial. The holdings of these two Seventh Circuit cases conflict with the decision below and the decision of the Second Circuit in *United States* v *Doe*, 405 F 2d 436.

There are only two decisions concerning the propriety under the Fourth Amendment of a trial judge requiring handwriting exemplars from an indicted defendant. *United States* v *Vignera*, 307 F Supp 136 (DC NY 1969) and *United States* v *Praigg*, 336 F Supp 480 (DC CD Cal 1972). The decisions cannot be reconciled.

If the court should grant review and decide that handwriting specimens can be required under certain conditions, then a subsidiary issue necessarily involved will be the nature and extent of the showing which the govern-

ment must make to establish the reasonableness of its request. To the extent that the decision below can be read as reaching the merits of the Fourth Amendment claim (rather than being based upon a claimed procedural default of petitioner) the decision plainly conflicts with *United States* v *Morrison,* 43 FRD 516 [DC Ill 1967]*

I. b

REQUIRING A DEFENDANT ON TRIAL TO FURNISH THE GOVERNMENT A HANDWRITING EXEMPLAR TO BE USED AGAINST HIM WOULD FORCE HIM TO INCRIMINATE HIMSELF.

This petition does not seek to challenge the holding of *Gilbert* v *California,* 388 US 263 nor the language of *Schmerber* v *California,* 384 US 757, 764, upon which *Gilbert* relies. Our concern is that in a single paragraph in the *Gilbert* opinion, the court disposed of an important constitutional question, i.e., the application of the Fifth Amendment to the required production of handwriting exemplars by a defendant.

This regrettably terse disposition has been misread by the lower courts as foreclosing further discussion of the subject. *Gilbert* should have been the start rather than the end of judicial inquiry in this area.

Although the growth of judicial expression in this area has been stunted, *United States* v *Green,* 282 F Supp 373 [DC Ind 1968] is at once a notable exception and an example of the need for further exploration.

---

* There it was the defendant rather than the government seeking discovery. It was held that his bare allegation that the requested documents were material to his defense was not a sufficient showing to justify discovery under Rule 16(b).

> The distinctions between compulsions of a communicative nature which are protected and those which produce only "identifying physical characteristics," or become the source of "real or physical evidence," which are not protected by the Fifth Amendment, are nebulous. In view of the nature of the request in the case at bar, the Court concludes that the exemplars fall within the exceptions noted by the Supreme Court in *Schmerber, supra*, 384 US at 764 . . . *id*, 374.*

Cf. *In re Riccardi*, 337 F Supp 253 [DC NJ 1972]. There, while recognizing an obligation to follow this court's decision in *Gilbert*, the court nonetheless was quite critical of it. He proceeded to deny the government's application for an order compelling handwriting exemplars on Fourth Amendment grounds, but with a Fifth Amendment rationale.

> This court is impressed with the fact that if the exemplars taken matched the forgeries then Riccardi would have been compelled by order of this court to prove the very body of the crime alleged, viz: forgery of credit cards.

In *Schmerber*, footnote 8, the court cited 8 Wigmore on Evidence, § 2265 [McNaughton Rev. 1961]. In that section of Wigmore, which considers the application of the Fifth Amendment to the forced exhibition of one's bodily condition, it was stated, page 400:

> The situations which stand at the boundary line are those in which not only is the person's affirmative participation essential (at least in the form of physical responses) but his knowledge, despite his will to the contrary is extracted.

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* The Court denied the government motion for exemplars, relying solely on the Fifth Amendment. Despite the obvious invitation, the government declined to appeal.

We suggest that this distinction was not lost upon this court in *Schmerber*. See footnote 9 insofar as it deals with the refusal to submit to a breathalyzer test, a test which required affirmative participation of the subject .

United States v *Long*, 325 F Supp 583, at 585 [DC WD Mo. 1971] spoke in the context of the Fourth Amendment and cited *Schmerber* as having "lumped together [fingerprinting] with photographing and writing for identification." Whatever validity there may be to such lumping under the Fourth Amendment does not carry over to lumping under the Fifth Amendment. What was actually before the court in *Schmerber* was an objective testing which did not require the subject's cooperation.

> Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone. 384 US at 765.

In *Lewis* v *United States*, 382 F 2d 817 [CA DC 1967] then Circuit Judge Burger regarded as unsound the assumption of the Tenth Circuit that by writing words on a sheet of paper one communicates that the marks represent his handwriting and thus the exemplars are communicative evidence. But the validity of such an assumption is demonstrated in Wigmore, § 2265, page 396, footnote 8:

> [8] To require a person, for purposes of identification, to speak or write or walk or otherwise behave of course may involve a compulsory disclosure of knowledge. When the instructions are that the person, on pain of punishment for contempt or perjury, behave in a manner which requires him to incorporate by reference his own incriminating knowledge in order for the instructions to have meaning, the privilege is violated. E.g., "Walk the way you did that Monday night" or "Write what you know of the matter." Obviously, to comply is to disclose

> knowledge. More difficult are "Walk in your normal way" or just "Write these words" (which implies "in your usual stayle"). Would compliance require a disclosure of *knowledge?* Not unless compliance by the suspect is construed to include a *voucher* that the gait, or handwriting produced is in his normal style. Another problem would arise when, say, the words written pursuant to compulsion reveal not only an involuntary muscular habit pattern but also a peculiar manner of spelling a word. Burr's secretary was not required to disclose that he understood a code [citation omitted]. It follows that a person is privileged not to disclose that he *mis*understands a code (spelling) if such ignorance is incriminating.

As was done here, the prosecution at trial can make an argument which is almost impossible to refute, i.e., that the defendant has made a conscious effort to disguise his handwriting. Whether the argument goes to the defendant's giving of the sample or to the alleged execution of the questioned document, it is a clear violation of the Fifth Amendment.

> To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. *Schmerber, supra,* 384 at 764.*

See *United States* v *Green,* 282 F Supp 373 [DC Ind 1968], to the same effect.

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* In *Schmerber,* footnote 8, this court refers to the cases collected in Wigmore, § 2265. Presumably, these are the cases in footnote 10 to Wigmore, page 397 which uphold "requiring a suspect [sic] to write for identification." But the cases cited deal with vastly different situations e.g., a defendant who waives his right to the Fifth Amendment by taking the stand; a suspect in custody being required to sign a bail card or an arrest card for the purposes of identification.

II.

HAVING OPPOSED THE GOVERNMENT'S MOTION BEFORE TRIAL, PETITIONER DID NOT WAIVE HIS CLAIM OF ERROR BY FAILING TO OBJECT AT TRIAL.

The trial judge entered her disputed order (App. D, *infra)* just four days before the commencement of trial over the written and oral objections of petitioner. To say, as the Court of Appeals apparently said, that petitioner waived his claim of error by failing to renew his objections at trial is to place a premium on form and to discount substance.

In *Henry* v *Mississippi,* 379 US 443, this court indicated that a motion at the conclusion of a case might substantially satisfy "the state interest served by the contemporaneous-objection rule." The court said:

> In these circumstances, the delay until the close of the state's case in presenting the objection cannot be said to have frustrated the state's interest in avoiding delay and waste of time in the disposition of the case. If this is so, and enforcement of the rule here would serve no substantial state interest, then settled principles would preclude treating the state grounds as adequate; giving effect to the contemporaneous-objection rule for its own sake "would be to force resort to an arid ritual of meaningless form." 379 US 448, 449.

Here, petitioner's position was made known to the trial judge *before* trial. Would there be any point in renewing the objection before the same judge the following week? If this is to be the rule, then we must assume that it is proper to ignore a *no smoking* sign unless it reads *positively no smoking.*

There are a number of Federal decisions consistent with the holding of the Sixth Circuit that an objection must be renewed at trial. We submit that these decisions are inconsistent with *Henry v. Mississippi*, and that the court should restate the principles of that case in the light of the Federal rule of contemporaneous-objection.

III.

DID THE TRIAL JUDGE HAVE THE AUTHORITY TO ENTER THE ORDER SHE DID?

At the outset, we wish to advise the court that this question was neither raised nor considered in the court below. But we believe the question is important and within the jurisdiction of this court to decide. See *Silber* v *United States,* 370 US 717.

The right of discovery by the government is a recent development in the law implemented by Rule 16 of the Federal Rules of Procedure according to *United States* v *Fratello,* 44 FRD 444 [DC NY 1968].

> Rule 16 (c) gives the Federal government for the first time access to discovery against criminal defendants. 1 Wright Federal Practice and Procedure, § 255.

However, in the opinion of Professor Orfield, the Federal Courts are not precluded from granting discovery in cases not covered by Rule 16 and 17 (c). He says "Five impressive arguments might be advanced in favor of liberal discovery." Orfield, *Criminal Procedure under the Federal Rules,* § 16:47.

We won't dispute Professor Orfield's premise now, since, on this point, the record below gives us such a shaky

basis for seeking a writ of certiorari. We do say that we will canvas the point extensively for the Court if certiorari is granted unlimited as to scope. It will be our position that the authority to grant discovery in favor of the government must be spelled out in a statute or rule since it is such a radical departure from past practice. There would be little need for the proposed Rule 41.1 if the courts have the inherent power to order such discovery. See *Proposed Amendments to Criminal Rules,* 52 FRD 409, 467.

CONCLUSION

The Petition for Certiorari should be granted and the case argued with *Dionisio* and *Mara* if review is granted in those cases also.

Respectfully submitted,

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Dated: May 11, 1972

APPENDIX A

No. 71-1551

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

United States of America, Plaintiff-Appellee, v. Louis A. Ruggirello, Defendant-Appellant.	Appeal from United States District Court Eastern District of Michigan, Southern Division.

Decided and Filed January 14, 1972.

Before: Edwards, Brooks and Kent, Circuit Judges.

Per Curiam. Appellant brings this appeal to challenge his conviction under each count of a Three-Count Indictment alleging fraudulent understatement of income for three different years.

After indictment and before trial the Government filed a formal motion seeking an order requiring the appellant to show cause why he should not be compelled to "give samples of his handwriting in the form requested by said special attorney, for the Department of Justice." The motion was supported by an affidavit which recited that the Government had in its possession documents, the authorship of which was material to the case pending against this appellant. After a formal hearing, at which appel-

lant's retained counsel conceded that the Court had the authority to require such samples of handwriting under the United States Supreme Court's decision in *Gilbert* v. *California,* 388 U.S. 263 (1967), the Trial Court entered an order requiring the appellant to give the handwriting samples. No objection was raised on the trial to the introduction of the handwriting samples in evidence.

Appellant now claims that the requirement that he give samples of his handwriting violated his Constitutional Rights under the Fourth and Fifth Amendments. On the record in this case the Court finds no merit in this or any other claim of error sought to be presented on this appeal.

Judgment affirmed.

APPENDIX B

JUDGMENT

No. 71-1551

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

United States of America,
Plaintiff-Appellee,
v.
Louis A. Ruggirello.
Defendant-Appellant.

(Filed January 14, 1972)

Before: Edwards, Brooks and Kent, Circuit Judges.

Appeal from the United States District Court for the Eastern District of Michigan.

The Cause came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 39(b).

Entered by order of the Court.

/s/ James A. Higgins
Clerk

APPENDIX C

ORDER

(U.S. Court of Appeals for the Sixth Circuit)

Decided and filed March 27, 1972

Before: Edwards, Miller and Kent, Circuit Judges.

Defendant-appellants' petition for rehearing having come on to be considered, and of the Judges of this Court who are in regular active service less than a majority having favored ordering consideration en banc,

Now, therefore, it is ordered that the motions for rehearing and for rehearing en banc be and they are hereby denied.

Entered by order of the Court.

/s/ James A. Higgins
Clerk

APPENDIX D

ORDER

(U.S. District Court—Eastern District of Michigan)

Upon oral argument heard before this Court on January 7th, 1971, and in consideration of the case law presented by both the Government and defense,

The Court hereby orders the following:

1. That Louis Ruggirello, forthwith and in the presence of the Court, give exemplar handwriting samples on the forms requested by the Government, which are certain signatures and printings in the names of other individuals or business corporation names and random words and letters. (Representative samples are attached.)

2. That photostats of each copy of the signatures that Louis Ruggirello signs or prints be made available to his counsel within three (3) days.

3. That as soon as counsel for the Government is made aware of the expert's decision, he will reveal this decision to counsel for the defendant.

4. That as soon as the report from the expert witness is completed, the Government will make the report available to the defendant's counsel and the Government's documents containing questioned signatures.

Cornelia G. Kennedy,
United States District Judge.

Dated: January 8, 1971.